United States Court of Appeals

for the Second Circuit

APPELLEE'S REPLY BRIEF

74-2592

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P/S

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Docket No. 74-2592

- - - - - - - - - - X - - - - - - - - - -

PETER BARTOK,

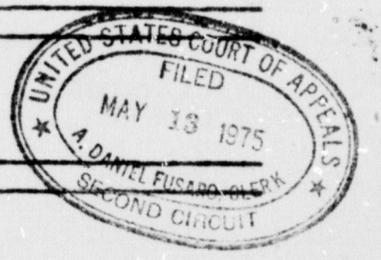
Plaintiff-Appellant,

- v -

BOOSEY and HAWKES, INC., and
BENJAMIN SUCHOFF, as Trustee
of the Estate of Bela Bartok,

Defendants-Appellees.

REPLY BRIEF FOR THE APPELLANT



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REPLY BRIEF FOR THE APPELLANT

ARGUMENT

"CONCERTO FOR ORCHESTRA" IS NOT A POSTHUMOUS WORK FOR PURPOSES OF SECTION 24 OF THE COPYRIGHT ACT

Appellees' contention that the meaning of the term "publication" as used in the first clause of Section 24 (preceding the "first proviso") must apply to a determination of what constitutes a "posthumous" work is erroneous.

The first clause of Section 24 deals solely with the duration of the original term of statutory copyright, i.e. twenty-eight years from the date of first publication. In this context, the concept of "publication" is utilized solely for the purpose of fixing the date upon which the term of original statutory copyright begins.* The proviso of Section 24 relates to an entirely separate and unrelated question, i.e. who is entitled to renew the copyright at the end of the original statutory term. To make such a determination in this case, it is necessary to further decide what is meant by a "posthumous" work, a term which is not defined by the statute. It should be apparent that to measure the term of statutory copyright requires the application of a "publication" concept whereas a determination of the issue before this Court does not.** The two provisions are wholly unrelated and no reason suggests that the one must be resolved in light of the other.

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* Even in this context, "publication" has acquired two different meanings. See Amicus Curiae Brief, pp. 8-9.

** Regardless of how this issue is determined, the length of the original term of statutory copyright remains unaffected.

Even assuming, arguendo, that a definition of "posthumous" depended on some concept of "publication", inasmuch as that concept has different meanings within the Copyright Act (see Appellant's Main Brief, pp. 18-20), and, moreover, within Section 24 itself (see Amicus Curiae Brief, pp. 8-10), only a concept of "publication" consistent with the fundamental purpose of the renewal provision should apply.

Boosey & Hawkes contends on p. 6 of its brief that whether a work is "posthumous" must depend upon when its author dies in relation to the date upon which statutory copyright is secured. This proffered definition would render "posthumous" every work upon which a statutory copyright was not obtained prior to its author's death, regardless of the extent to which the work was commercially exploited under the common law copyright during the author's lifetime.

Moreover, appellee Such[illegible]f's contention on p. 7 of its brief that the term "posthumous work" is actually defined in Section 24 as "one upon which the copyright was originally secured by a 'proprietor' thereof" is nonsense. In addition to the categories of non-posthumous proprietor

renewals specified in Section 24, a "proprietor" secures the original statutory copyright in every instance wherein an author executes an assignment of his common law copyright to another, regardless of when the author dies. It would be absurd to regard all such works of living authors as "posthumous".

Moreover, any publisher who has been the assignee of a common law copyright in an unpublished work during the lifetime of the composer (and who, at that time, by registering the unpublished work with the Copyright Office, could have become the "proprietor" of a non-posthumous work) cannot subsequently become as well the "proprietor" of that composition, as a "posthumous" work. Common sense dictates that one status be exclusive of the other.

Appellees' reliance on the inanalogous Chopin example resorted to by the District Court (Appendix, pp. 100a-101a) is misplaced for the reasons stated in Appellant's Main Brief, pp. 28-32. Nevertheless, if weight is to be given to a publisher's designation of a particular work as "posthumous", it should be noted that Boosey & Hawkes did not designate Bartok's "Concerto for Orchestra" as "posthumous" on <u>either</u> the copyright registration form or on the first

printed edition of the work, although the "Viola Concerto", a later work by Bartok, was so designated by Boosey & Hawkes on both the copyright registration form and on the first printed edition.

To appellee Suchoff's argument on p. 14 of its brief that there is no basis for presuming that publishers may act in bad faith in respect of obtaining statutory copyright protection, appellant can only reply that musical compositions can be exploited for substantial profits without statutory copyright protection; it was the conduct of publishers which prompted the enactment of Section 24; and the definition of "posthumous" as urged by appellees, apart from its other deficiencies, is an invitation to impropriety.

Appellant's reliance upon the intent of the legislature underlying the enactment of Section 24, and the intent of the composer to bring his work to the attention of the public during his lifetime, as bearing directly upon a definition of "posthumous", does not justify appellees' reliance on the composer's "testamentary" intent in this regard. Inasmuch as Congress, in the interest of protecting an author's widow and children, contemplated that Section 24 would override testamentary directions, it is absurd to

claim that "Concerto for Orchestra" be classified "posthumous", the effect of which would exclude the statutory successors from the benefits of copyright renewal so that such benefits could accrue to a trust in accordance with testamentary directions.*

Finally, Boosey & Hawkes' contention, as expressed on p. 14 of its brief, that judicial acceptance of appellant's definition of "posthumous" would retroactively invalidate many renewals by proprietors of posthumous works and thereby cast those works into the public domain is wholly unfounded for the following reasons:

1. There is no evidence regarding the number of copyrights in existence relating to musical compositions which were commercially exploited during the composer's lifetime but which were not copyrighted by the publisher-proprietor until after the author's death. Indeed, numerous such examples do not spring from the papers submitted by the parties to this proceeding. Even assuming some similar instances exist, it is possible that, as in this case,

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* There is no evidence that Bartok executed the testamentary trust provision with U.S. Copyright law in mind, or even if he were aware of the law, intended to circumvent the provisions of Section 24 by including within the scope of the trust renewal rights which pass outside of the Estate.

renewal applications were filed by all potential claimants, thereby assuring protection of the copyright. Moreover, since the great majority of musical compositions are authored by more than one composer, renewal in the name of any one of such authors would protect the copyright. Marx Music Corp. v. Jerry Vogel Music Co., 47 F.Supp. 490 (S.D.N.Y. 1942);

2. In this case, however, as in Jerry Vogel Music Corp. v. Edward B. Marks Music Corp., 425 F.2d 834, 836 (2d Cir. 1969), the Court is not bound to apply its decision retroactively to prior renewals of other works if it determines that such application would cause undue hardship or invalidate transactions carried out in good faith; and

3. Even were this Court to apply its decision retroactively to prior renewals of other works in the same category as Bartok's "Concerto for Orchestra", such a decision would not cause those renewal copyrights to fall into the public domain.* Indeed, in those cases where a

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* In the instant case, the renewal application filed by plaintiff precludes any possibility of the work falling into the public domain, in the event of a decision for plaintiff-appellant.

publisher-proprietor of the copyright in question had obtained a first-term assignment of the renewal rights, the Court could find an implied power of attorney in the publisher, by virtue of the assignment, to have effected renewal on behalf of the author's widow and children, Rose v. Bourne, 279 F.2d 79, 81 (2d Cir. 1960); Rossiter v. Vogel, 134 F.2d 908, 911 (2d Cir. 1943), or find that the publisher obtained and held the renewal copyright under a "constructive trust" for the true beneficial owner, i.e. the author's widow and children. Goodis v. United Artists Television, Inc., 425 F.2d 397, 399 (2d Cir. 1970); see Jerry Vogel Music Corp. v. Edward B. Marks Music Co., supra; Bisel v. Ladner, 1 F.2d 436 (3rd Cir. 1924).

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be reversed, and Bela Bartok's "Concerto for Orchestra" declared not to be a "posthumous" work for the purposes of Section 24 of the Copyright Act.

Dated: New York, New York
May 13, 1975

Respectfully submitted,

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